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November 6, 2020

**Via Electronic Mail**

Thomas P. Carroll  
Acting Director, Air Enforcement Division  
U.S. Environmental Protection Agency  
MC 2242A  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Re: *United States v. Orion Engineered Carbons, LLC*, Consent Decree (Case No. 6:17-cv-01660) – Notice of Intent to Assert Claim of Force Majeure – Sixth Supplemental Update

Dear Mr. Carroll:

Orion Engineered Carbons, LLC (Orion) provides this letter in response to EPA's letters dated April 24, 2020 and October 21, 2020. EPA's April 24 letter requested updates regarding Orion's March 23, 2020 notice of intent to assert force majeure (the "Orion Notice"). EPA's April 24 letter requested an initial response within four weeks and supplemental updates every four weeks thereafter. Orion provided its initial response on May 21, 2020 (the "Initial Response") and supplemental updates each month thereafter. This letter is Orion's sixth supplemental update, and it also serves as a response to EPA's October 21 letter.

Orion disagrees with the allegations in EPA's October 21 letter regarding the adequacy of Orion's force majeure claim. The letter states that Orion "has not adequately supported 'the reasons for the delay or impediment, the anticipated duration of the delay or impediment, all actions taken or to be taken to prevent or minimize the delay or impediment, [and] a schedule for implementation of any measures to be taken to prevent or mitigate the delay or impediment or the effect of the delay or impediment.'" The letter also states that Orion "has not demonstrated that it has exercised and continues to exercise 'best efforts' to fulfill its obligations under the Consent Decree." Additionally, citing a communication from Orion's supplier [REDACTED] to Louisiana Department of Environmental Quality (LDEQ), the letter states that EPA "was surprised to read Defendant's statement that it '[REDACTED]'. Finally, referencing [REDACTED] specifically, EPA states that Orion has not provided "evidence of any efforts, much less best efforts, to cure any purported delays (for example, through solicitation of a different [REDACTED] provider [to replace [REDACTED]])".

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Given Orion's extraordinary efforts to mitigate the continuously evolving impacts of COVID-19 and the extensive information Orion has provided EPA in seven detailed submissions, Orion believes EPA's claims are unfounded. Orion addresses EPA's allegations in turn.

### **Orion Has Provided Sufficient Information**

Orion has satisfied the information requirements of Paragraph 73 of the Consent Decree. The Orion Notice explained with specificity the reasons for the delay, the anticipated duration of the delay, all actions taken or to be taken to prevent or minimize the delay, and Orion's rationale for attributing such delay to the COVID-19 crisis. The Orion Notice also provided a schedule for implementation of measures to be taken to prevent or mitigate the delay. Moreover, the Orion Notice provided all relevant documentation, including numerous force majeure notice letters from construction contractors and suppliers of essential parts.

Since submittal of the Orion Notice, Orion has provided *six* supplemental submissions to EPA providing detailed updates regarding Orion's progress toward achieving its proposed revised deadline and actions taken to prevent or minimize delay. These submissions have included, among other information, (i) detailed histograms showing planned and actual construction progress and manpower, (ii) updates from Orion's contractors and suppliers related to COVID-19, and (iii) state and local orders related to COVID-19.

Regarding Orange, Orion's extraordinary efforts to mitigate the impacts of COVID-19 allowed Orion to report in its June 19, 2020 submission that it achieved all of the Consent Decree's deadlines for Orange. Orion went to extraordinary efforts to manage travel restrictions, coordinate contractors and suppliers, and secure various specialists necessary for SCR commissioning despite COVID-19 disruptions. This allowed Orion to introduce tail gas to the new controls on June 1, 2020 and perform stack testing in mid-June 2020, thus meeting the June 30, 2020 deadline. Orange provides a clear example of Orion's best efforts to fulfill its obligations under the Consent Decree.

Regarding Ivanhoe, Orion's submissions have demonstrated that the effects of COVID-19 both caused construction delays to date and necessitate Orion's proposed revised deadline for pollution controls at that plant. Louisiana has endured two waves of COVID-19 and 5,737 COVID-19 deaths.<sup>1</sup> See Figure 1. COVID-19 cases quickly started escalating in late March 2020, [REDACTED].<sup>2</sup> Shortly thereafter, between July and September 2020, Louisiana was in the grips of an even worse spike, which only recently flattened. Louisiana averaged 40 COVID-19 deaths per day during the first wave in April and May 2020 and 24 deaths per day during the second wave between July and

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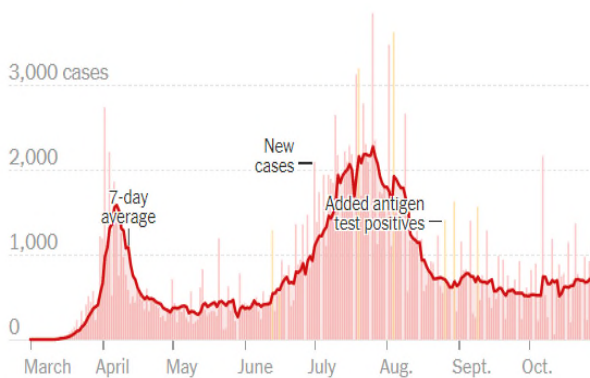
<sup>1</sup> USA Facts, Louisiana Coronavirus Cases and Deaths, <https://usafacts.org/visualizations/coronavirus-covid-19-spread-map/state/louisiana> (last updated Nov. 4, 2020).

<sup>2</sup> See Initial Response at 7 (Pre-COVID-19 Manpower and Percent Complete Histogram).

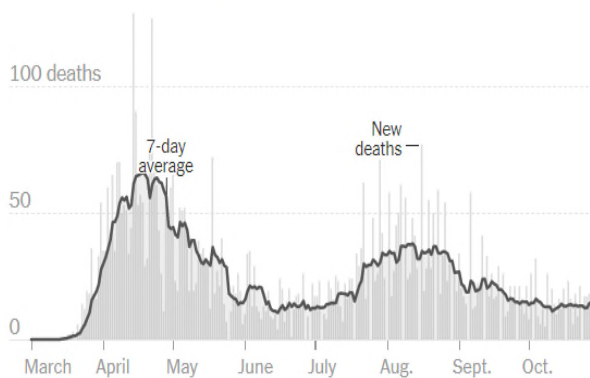
September 2020.<sup>3</sup> Moreover, the Louisiana Department of Health has identified “Industrial Settings” like Ivanhoe as the setting with the highest number of outbreaks.<sup>4</sup> The total of 66 outbreaks at “Industrial Settings” is greater than that for any other setting, including bars (43), child daycares (31), religious services and events (41), and restaurants (51).<sup>5</sup>

Given that the [REDACTED] phase required manpower to increase from [REDACTED] people to [REDACTED] people under the pre-COVID-19 schedule and to [REDACTED] people under the proposed revised deadline, delay of this phase until after the two severe COVID-19 spikes has unquestionably protected the health of Orion’s employees and contractors and has likely saved lives.<sup>6</sup>

Daily reported new cases



Daily reported deaths



**Figure 1: COVID-19 New Cases and Deaths in Louisiana.<sup>7</sup>**

Additionally, as presented in Orion’s submissions, a leveling off in the number of COVID-19 cases and deaths has only recently enabled Louisiana to enter Phase 3 of reopening. Prior to entry into Phase 3 reopening in September 2020, Orion risked running afoul of federal guidance and state orders requiring social distancing and limiting crowd size if Orion had proceeded with the original, pre-COVID-19 construction schedule.<sup>8</sup>

<sup>3</sup> USA Facts, *supra* note 1.

<sup>4</sup> Louisiana Department of Health, COVID-19 Outbreaks, <https://ldh.la.gov/index.cfm/page/3997> (last updated Nov. 4, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> See Initial Response Figure 1 (Pre-COVID-19 Manpower and Percent Complete Histogram).

<sup>7</sup> N.Y. Times, *Louisiana COVID Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/louisiana-coronavirus-cases.html#cases> (last updated Oct. 29, 2020, 4:58 P.M. E.T.).

<sup>8</sup> See Initial Response Figure 1 (Pre-COVID-19 Manpower and Percent Complete Histogram).

[REDACTED]

[REDACTED]

**Orion Continues to Exercise Best Efforts** [REDACTED]

Orion has exercised and continues to exercise best efforts to fulfill its obligations under the Consent Decree. As discussed above, Orion's best efforts at Orange in fact enabled Orion to achieve the Consent Decree's deadline for Orange and withdraw its claim of force majeure for Orange.

At Ivanhoe, Orion's best efforts have similarly resulted in accelerated progress, and Orion is now pleased to report that it believes it can [REDACTED]

[REDACTED]

Additionally, Orion used best efforts to successfully mitigate potential delays due to hurricanes in August 2020. Flooding and other disruptions due to hurricanes Marco and Laura had the potential to delay construction progress at Ivanhoe by [REDACTED]. In each case the plant was surrounded by local flooding, accessible only by boat, and protected by the levee. [REDACTED]

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<sup>9</sup> See Initial Response Figure 3 (Procured Equipment Impacted by COVID-19). [REDACTED]

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[REDACTED]

While many uncertainties remain, Orion will continue to exercise best efforts to fulfill its obligations under the Consent Decree. Orion's ability to accelerate the schedule [REDACTED] assumes that conditions with regard to COVID-19 in Louisiana will not again significantly worsen. Orion notes that the U.S. recorded its worst week yet for COVID-19 new cases during the last week of October.<sup>10</sup> Orion will continue to closely monitor conditions and keep EPA informed of Orion's progress.

### [REDACTED]'s Statement Is Consistent with Orion's Submissions

While Orion did not approve the language from [REDACTED] that EPA quotes in its October 21 letter, the language is consistent with Orion's submissions. In the Initial Response, Orion stated:

[REDACTED]

Orion's subsequent submissions have maintained the same level of transparency, [REDACTED]

[REDACTED]

### Replacement of [REDACTED] Is Not an Option

EPA's October 21 letter suggests that Orion may be able to substitute [REDACTED] [REDACTED]. However, solicitation of a different [REDACTED] provider is not an option for several reasons. [REDACTED]

[REDACTED]

<sup>10</sup> Lauren Leatherby, *United States Records Its Worst Week Yet for Virus Cases*, N.Y. Times (Oct. 30, 2020), <https://www.nytimes.com/interactive/2020/10/30/us/us-covid-case-record.html?action=click&module=Top%20Stories&pgtype=Homepage>.

[REDACTED]

[REDACTED]

For all of the foregoing reasons, Orion objects to EPA's allegations. Orion has already spent [REDACTED] and will ultimately spend [REDACTED] to comply with the Consent Decree's requirements for Ivanhoe. [REDACTED]

[REDACTED] Orion appreciates EPA's statements regarding (i) the central importance of protecting public health and safety, (ii) uncertainty with respect to future COVID-19 restrictions and disruptions, and (iii) the importance of maintaining open dialogue. Orion shares EPA's commitment to health, safety, and robust communication. The high outbreak rate in industrial settings is a reality that must be taken seriously in order not to endanger lives and the project in general.

We ask that you treat the redacted portions in the public version of this submittal as confidential business information (CBI) pursuant to 40 C.F.R. Part 2. Orion's updated responses to the questions in EPA's April 24 letter follow.

### **Ivanhoe**

1. Clarify the meaning of the term, "pollution control projects required by the CD at [] Ivanhoe."

No change since Initial Response.

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<sup>11</sup> Initial Notice at 17-18.

<sup>12</sup> CDC, Travelers Prohibited from Entry to the US, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html> (last updated Sept. 14, 2020).

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2. Do the PM Early Warning Systems, baghouses and incineration devices necessary to achieve MACT compliance remain operational?

No change since Initial Response.

3.

[REDACTED]

[REDACTED]

4. What activities are the employees performing? Are they making carbon black?

[REDACTED]

5. Provide any updates received from Defendant's contractors related to COVID-19.

No change since prior response.

6. Provide any updates, orders, or directives from state and local officials related to COVID-19.

The following is a brief summary of orders issued since the fifth supplemental update that affect Orion:

**Louisiana**

October 8:

Governor issues Proclamation 134 keeping Louisiana in Phase 3 of reopening, continuing the statewide mask mandate, and limiting crowd sizes to no more than 50% of the capacity set by the State Fire Marshall.<sup>13</sup>

Governor also issues Proclamation 135 extending emergency provisions imposing travel restrictions on public employees, suspending in-person shareholder meetings, and imposing a variety

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<sup>13</sup> State of Louisiana, Proclamation 134 JBE 2020 (Oct. 8, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/134-JBE-2020-COVID-19-Public-Health-Emergency.pdf>.

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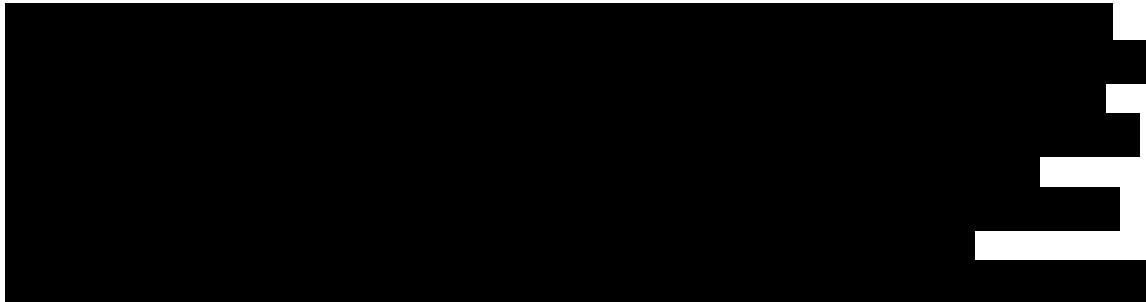
of restrictions on the operations of government entities, among other measures.<sup>14</sup>

LDEQ issues Fourteenth Amended Declaration of Emergency and Administrative Order. LDEQ declares that “an emergency exists” and that “measures are necessary to prevent serious threats to life or safety.” The order extends certain regulatory deadlines, among other measures.<sup>15</sup>

October 23: LDEQ issues Fifteenth Amended Declaration of Emergency and Administrative Order, which largely leaves in place emergency measures from the preceding order.<sup>16</sup>

Although some restrictions have been lifted, the Governor has made clear that immediate reinstatement may occur at any time: “[S]hould there be an increase in the number of confirmed COVID-19 cases or should the number of COVID-19 related hospitalizations threaten the ability of the health care system to properly respond, it may be necessary to go back to the full restrictions in the [original] Stay at Home order.”<sup>17</sup>

7. Provide a detailed construction schedule, reflective of the anticipated schedule as of March 1, 2020, (broken out by month), that specifies the work being performed, the number of contractors expected to be on site (noting the name of the company), the anticipated date of arrival of major parts, and any other relevant information.



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<sup>14</sup> State of Louisiana, Proclamation 135 JBE 2020 (Oct. 8, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/135-JBE-2020-Renewal-of-SOE.pdf>.

<sup>15</sup> Louisiana Department of Environmental Quality, Fourteenth Amended Declaration of Emergency and Administrative Order (Oct. 8, 2020), [https://www.deq.louisiana.gov/assets/docs/emergency\\_declarations/FourteenthDEAOCOV19.pdf](https://www.deq.louisiana.gov/assets/docs/emergency_declarations/FourteenthDEAOCOV19.pdf).

<sup>16</sup> Louisiana Department of Environmental Quality, Fifteenth Amended Declaration of Emergency and Administrative Order (Oct. 23, 2020), [https://www.deq.louisiana.gov/assets/docs/emergency\\_declarations/DEAO15thCOVID-19.pdf](https://www.deq.louisiana.gov/assets/docs/emergency_declarations/DEAO15thCOVID-19.pdf).

<sup>17</sup> State of Louisiana, Proclamation 134 JBE 2020 (Oct. 8, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/134-JBE-2020-COVID-19-Public-Health-Emergency.pdf>.





**Conclusion**

Orion remains committed to working with EPA to adhere to federal and state orders and to protect the health and safety of its employees, contractors, and communities. Orion will continue to provide EPA updates every four weeks. Thus, Orion will provide its next update on or about December 4, 2020.

Sincerely,

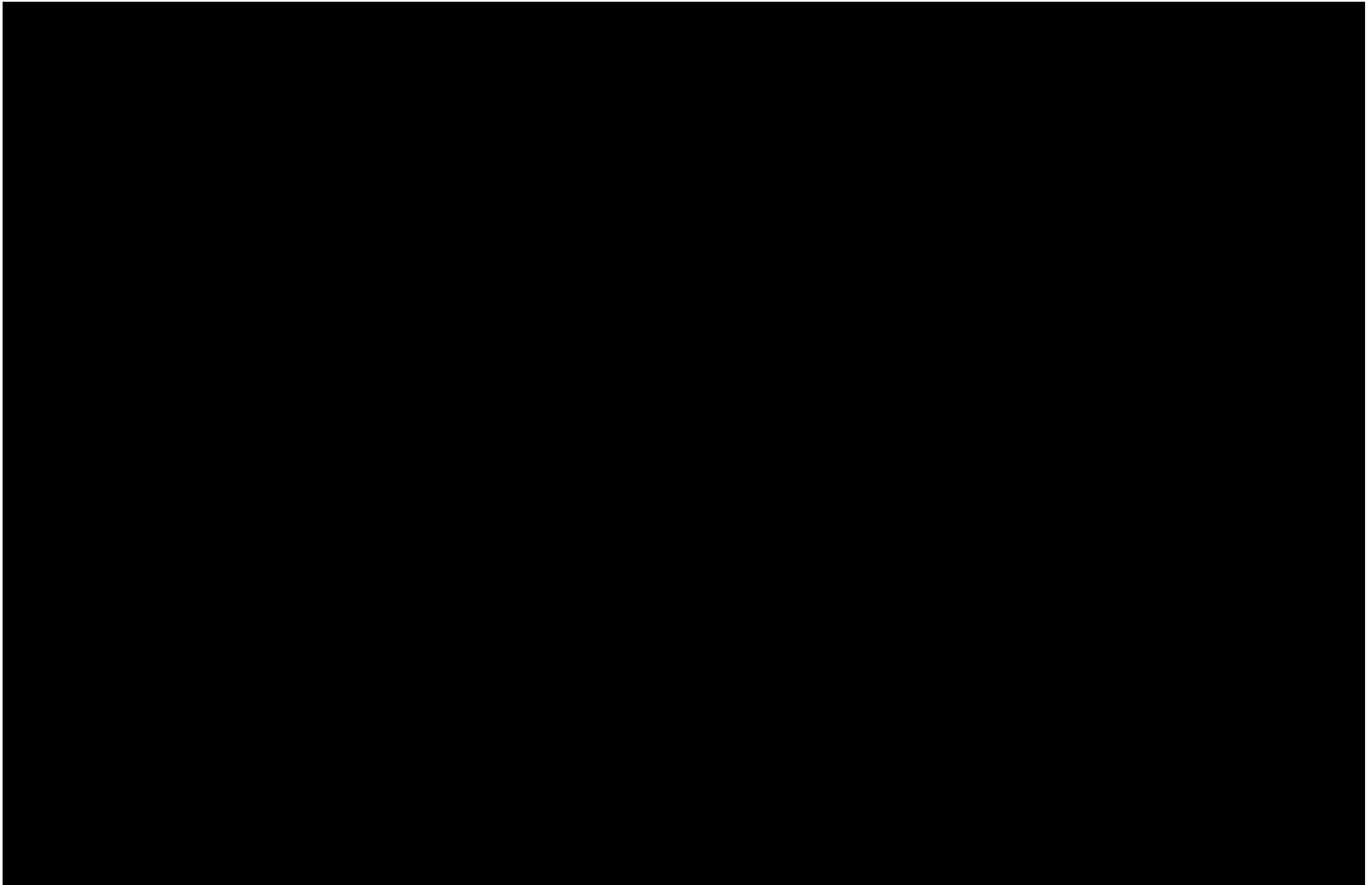
A handwritten signature in blue ink, appearing to read "C. Painter".

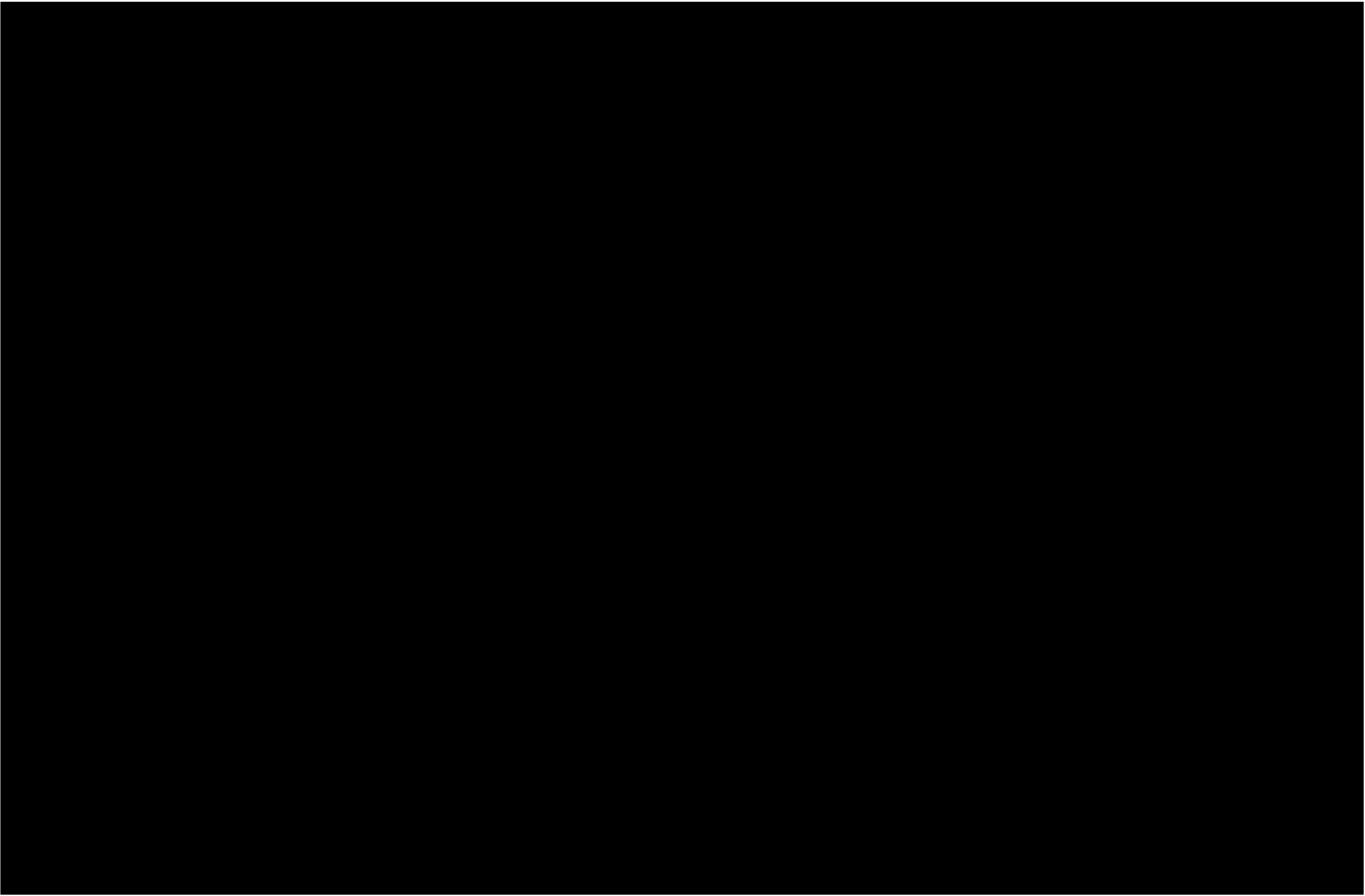
Corning Painter  
Chief Executive Officer  
Orion Engineered Carbons, GmbH

cc: Kellie Ortega, U.S. Environmental Protection Agency  
David Friedland, Beveridge & Diamond, P.C.  
Jason Dunn, U.S. Department of Justice  
Katherine Abend, U.S. Department of Justice  
Celena Cage, Louisiana Department of Environmental Quality  
Brandon Williams, Louisiana Department of Environmental Quality  
Dwana King, Louisiana Department of Environmental Quality

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**Attachment 1: Orion Equipment Updated Status Report**







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**Attachment 2: Construction - Overall Progress and Manpower**

